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COMMONWEALTH OF VIRGINIA

STATE CORPORATION COMMISSION

AT RICHMOND, JANUARY 24, 2000

PETITION OF

STARPOWER COMMUNICATIONS, LLC

CASE NO. PUC990023

For Declaratory Judgment
Interpreting Interconnection
Agreement with GTE South, Inc.

and

PETITION OF

COX VIRGINIA TELCOM, INC.

CASE NO. PUC990046

v.

GTE SOUTH INCORPORATED

For enforcement of interconnection
agreement for reciprocal compensation
for the termination of local calls
to Internet Service Providers

FINAL ORDER

On February 4, 1999, and March 18, 1999, Starpower Communications, LLC, ("Starpower") and Cox Virginia Telcom, Inc., ("Cox") filed their respective petitions against GTE South Incorporated ("GTE"), seeking declaratory relief and enforcement of their interconnection agreements with GTE. Specifically, Starpower and Cox seek the payment of reciprocal compensation for their transport and termination of GTE's traffic to Internet service providers ("ISPs"). All pleadings have been filed by

the parties as provided in the Commission's Preliminary Order of June 22, 1999, and Second Preliminary Order of August 9, 1999.

In Case No. PUC970069,¹ Cox, in its petition for enforcement of its interconnection agreement with Bell Atlantic-Virginia, Inc. ("BA-VA"), presented the issue of payment of reciprocal compensation for its transport and termination of BA-VA traffic to ISPs served by Cox. We found in that case that calls to ISPs as described in the Cox petition constituted local traffic, and that both Cox and BA-VA were entitled to reciprocal compensation for the termination of this type of call. We found that calls to an ISP dialed on a seven-digit basis were local in nature.

Subsequent to that Order, the Federal Communications Commission ("FCC") issued an order in which it held that the jurisdictional nature of ISP-bound traffic is determined by the end-to-end transmission between an end user and the Internet.² The FCC further concluded that such ISP-bound traffic is jurisdictionally mixed and appears to be substantially interstate rather than intrastate.³

¹ Petition of Cox Virginia Telcom, Inc., For enforcement of interconnection agreement with Bell Atlantic-Virginia, Inc., Case No. PUC970069, 1997 S.C.C. Ann. Rep. 298, Final Order (Oct. 24, 1997).

² In re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Inter-Carrier Compensation for ISP-Bound Traffic, Declaratory Ruling and Notice of Proposed Rulemaking, CC Dockets 96-98 and 99-68, FCC 99-38, released Feb. 26, 1999 (hereinafter, "Reciprocal Compensation Order"), at ¶ 12.

³ Id. at ¶ 1.

In its Reciprocal Compensation Order, the FCC did not support the extension of its jurisdiction over locally dialed calls to ISPs with any rules regarding inter-carrier compensation for ISP-bound traffic. Nor has the FCC made modifications to jurisdictional separations systems that apportion regulated costs and revenues between intrastate and interstate jurisdictions.

The FCC did, however, establish a further rulemaking to consider prospective inter-carrier compensation methods for ISP-bound traffic. As part of this rulemaking, the FCC requested comment on the implications of various alternative inter-carrier compensation proposals "on the separations regime, such as the appropriate treatment of incumbent [local exchange carrier ("ILEC")] revenues and payments associated with the delivery of such traffic."⁴ In the interim, the FCC left it to state commissions to consider what effect, if any, its ruling had on state decisions regarding present reciprocal compensation provisions of interconnection agreements whether negotiated or arbitrated.⁵

This matter is of serious concern to this Commission because, notwithstanding its interstate classification of ISP-bound traffic, the FCC continues to require ILECs to account for

⁴ Id. at ¶ 36.

⁵ Id. at ¶ 27.

costs and revenues associated with end users' and ISPs' end office connections for ISP-bound traffic as intrastate for jurisdictional purposes and to require that such services be purchased from intrastate tariffs.⁶

In its Order, the FCC assures us that it has no intention of permitting a mismatch of costs and revenues between the jurisdictions.⁷ However, the FCC has yet to commit to the separations reform necessary to match the jurisdictional costs and revenues to its "newly" determined interstate jurisdiction for ISP-bound traffic.⁸ Moreover, to date the FCC has not acted in its rulemaking regarding inter-carrier compensation for ISP-bound traffic nor adopted separations reform.⁹

The FCC's stated goal in its Separations Reform NPRM was a comprehensive review of the Part 36 separations rules to

⁶ The Chief of the Common Carrier Bureau of the FCC has directed Bell Atlantic and SBC Communications to reclassify their ISP-bound expenses and revenues as intrastate in their ARMIS reporting. See "Common Carrier Bureau Issues Letter To Bell Atlantic Regarding Jurisdictional Separations Treatment of Reciprocal Compensation For Internet Traffic", ASD 99-40, Released July 30, 1999.

⁷ Separations Reform Order at ¶ 36.

⁸ The time may come when the State Corporation Commission will have to consider disallowing, for ratemaking purposes, intrastate costs associated with carrying ISP-bound traffic even though the FCC continues to require these costs to be apportioned intrastate.

⁹ In re Jurisdictional Separations Reform and Referral to the Federal-State Joint Board, Notice of Proposed Rulemaking, 12 FCC Rcd 22120, 22122 (1997) (hereinafter, "Separations Reform NPRM").

consider changes in the telecommunications industry.¹⁰ The Separations Joint Board is currently reviewing various proposals for separations rule changes. As part of this effort, the State Members of the Separations Joint Board have recently developed a cost study tool to help evaluate cost shift effects of separations rule changes.¹¹ To demonstrate the use of this tool the State Members estimated the possible effect of two recent FCC decisions, one of which was the Reciprocal Compensation Order. The potential misallocation of costs to the state jurisdictions appears enormous.

The cost study tool estimated costs that would be allocated to the interstate jurisdiction if the FCC had found that Internet minutes should be counted as interstate for separations purposes. The State Members reported that "it appears that the effect of moving Internet minutes to the interstate jurisdiction would be a shift in costs of about \$2.8 billion annually nationwide (about \$1.40 per line per month) to the interstate jurisdiction."¹²

¹⁰ "The fundamental basis on which separations are made is the use of telecommunications plant on each of the [interstate and intrastate] operations." (47 C.F.R. § 36.1(c)).

¹¹ See "Formal Request from State Members For Notice and Comment on Separations Simulation Cost Study Tool", filed October 28, 1999, in the FCC proceeding captioned In the Matter of Jurisdictional Separations Reform and Referral to the Federal-State Joint Board, CC Docket 80-286. The FCC requested comments on the cost study analysis tool by December 17, 1999.

¹² Id.

Based on the FCC's failure to act on either inter-carrier compensation or separations reform for ISP-bound traffic, we conclude that the Reciprocal Compensation Order has created great regulatory uncertainty. In the absence of any FCC rules on inter-carrier compensation for ISP-bound traffic, any interpretation of the instant agreements we might reach may well be inconsistent with the FCC's final order in its rulemaking. Further, our decision on these agreements might also conflict with the FCC's ultimate resolution of the separations reform issues, which also remain unresolved.

Given the possibility of conflicting results being reached by this Commission and the FCC, we believe the only practical action is for this Commission to decline jurisdiction and allow the parties to present their cases to the FCC. The FCC should be able to give the parties a decision that will be compatible with any future determinations that it might issue. Being unable to determine the FCC's ultimate resolutions of these issues, any decision by us would be compatible with such rulings only by coincidence.

We further conclude that the FCC's Reciprocal Compensation Order, to the extent it intends to confer regulatory jurisdiction, is of dubious validity. The FCC has concluded that ISP-bound traffic is "jurisdictionally mixed and appears to

be largely interstate" in nature.¹³ Nevertheless, the FCC has suggested that the states should continue to approve and construe interconnection agreements that establish compensation for transport and termination of ISP-bound traffic, because "neither the statute nor our rules prohibit a state commission from concluding in an arbitration that reciprocal compensation is appropriate in certain instances not addressed by Section 251(b)(5), so long as there is no conflict with governing federal law."¹⁴

The Commission is a constitutional agency that derives all of its powers and authority from the Constitution of Virginia and properly enacted legislative measures. A statement by the FCC does not, per se, grant jurisdiction to this Commission. Thus, even if we could, by chance, respond to the petitions in a manner not inconsistent with rules the FCC may later adopt, our ruling might be challenged on jurisdictional grounds by a party dissatisfied with the outcome.¹⁵

Therefore, upon full consideration of the pleadings, the Reciprocal Compensation Order, and the applicable statutes and rules, we find we should take no action on the petitions. We

¹³ Reciprocal Compensation Order at ¶ 1.

¹⁴ Id. at ¶ 26.

¹⁵ We will not comment on the validity of such a challenge, but note that the invitation of the FCC for us to act in these cases may encourage such a challenge.

will dismiss these petitions without prejudice but encourage the parties to carry their requests for construction of these agreements to the FCC where they can obtain relief that should be consistent with the rules the FCC may issue in the future. It is also our hope that referring these parties to the FCC might encourage the FCC to complete its rulemaking on inter-carrier compensation and to address the separations reform issues for ISP-bound traffic. Accordingly,

IT IS THEREFORE ORDERED that the petitions in Case Nos. PUC990023 and PUC990046 are DISMISSED and, there being nothing further to come before the Commission, the papers transferred to the files for ended causes.